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UNITED STATES OF AMERICA,
Petitioner,

v.

ANTONIO J. MORRISON, *et al.*,
Respondents.

CHRISTY BRZONKALA,
Petitioner,

v.

ANTONIO J. MORRISON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE STATE OF ALABAMA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF *AMICUS* INTEREST

Every branch of government but one supported passage of the Violence Against Women Act of 1994 ("VAWA"), Pub. L. No. 103-322, § 40302, 108 Stat. 1902, 1941 (codified at 42 U.S.C. § 13981). At the national level, overwhelming bi-partisan majorities in the Senate and House promoted the legislation, and so did the President. At the local level, most States supported the measure, and now 36 of them conspicuously advance its constitutionality here. Just one glance at the types of crimes covered by this law, aptly illustrated by the egregious allegations in this case, *see* U.S. Br. 11-12, explains why.

Yet it is precisely the utter depravity of these local crimes that makes national regulation of them neither necessary nor proper. No sane public official of any sort today — elected or unelected, local or national, democrat or republican, prosecutor or legislator — would stand in the way of full and complete remedies for such shameless acts. The very nature of the crime provides all the assurance anyone needs that it will not go unremedied — at least to the extent public officials have any say in the matter.

In submitting this *amicus curiae* brief, then, the State of Alabama does not take issue with the commendable policy considerations that motivated the political branches of government to act. It does not disagree with the policy concerns specifically raised by her sister States in their brief. *See* Brief *Amici Curiae* of Arizona, *et al.* And it does not contest any other component of VAWA save the discrete civil-remedy provision challenged here. *See* 42 U.S.C. § 13981. Gender-motivated violence, it is clear, has no place in our society. And, if there were doubt on this score, we would be tempted to ignore the constitutional defects in this provision rather than acknowledge them and, in so doing, be compelled to support the invalidation of this law. But no such doubt exists. As the Appendix to this brief illustrates, every State in the country offers a tort remedy for crimes like this one, along

with a host of other remedial and enforcement provisions designed to root out precisely the types of misogynistic — in truth, misanthropic — acts that were the prologue to this law and to the allegations in this case.

Moreover, to the extent enforcement gaps still exist in this area of the law, they stem not from any shortage of political conviction but from constitutional limits on the remedies the States may provide and on the policy initiatives they may undertake to address the societal problems that prompt human beings so to treat one another. Indeed, if Alabama had its way when it comes to punishing crimes like these, the mere threat of a civil remedy would be the least of a defendant's worries. The same is true of other States. State officials, to say nothing of federal officials, are more prone today zealously to over-enforce criminal laws than sheepishly to under-enforce them. Nor does this federal remedy address perhaps the most glaring enforcement problem in this area, namely the reticence of many crime victims to pursue tort or criminal remedies at all. Regrettably, however, a victim unwilling to pursue an existing State-law tort remedy is no more likely to pursue a parallel Federal one in its stead.

In the end, the nearly-unanimous showing of governmental support for this provision and the nationwide commitment to bringing such wrongdoers to heel not only casts doubt on the alleged shortage of national resolve regarding this issue, but also underscores the Court's essential role in judicially reviewing such popular laws. Federalism, as this case aptly proves, is no less a counter-majoritarian right than the Constitution's other structural guarantees of liberty.

"Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

For many of the same reasons that the Court has not hesitated to preserve the horizontal separation of powers in a series of cases invalidating widely-supported national measures, *see, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), *INS v. Chadha*, 462 U.S. 919 (1983), *Bowsher v. Synar*, 478 U.S. 714 (1986), *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), it has not refrained from preserving a vertical separation of powers between the National government and the States and from doing so in the context of equally popular measures. Congressional efforts to protect religious liberties, *City of Boerne v. Flores*, 521 U.S. 507 (1997), to regulate guns in the vicinity of schools, *United States v. Lopez*, 514 U.S. 549 (1995), to regulate the disposal of nuclear waste, *New York v. United States*, 505 U.S. 144 (1992), and to provide money-damages relief for overtime work, *Alden v. Maine*, 119 S. Ct. 2240 (1999), all have been reigned in by the constitutionally-required balance between the dual sovereigns and the enduring check of judicial review. Today's law is no different — both in its widespread support and in its improper assumption of power.

As these cases forever teach, the National Legislature does not advance the cause of liberty by embracing a statutory freedom at the expense of abandoning a constitutional one. To the ends of advancing these views and of elaborating on them, the State of Alabama respectfully submits this brief for the Court's consideration.

SUMMARY OF ARGUMENT

In enacting the civil-remedy provision of the Violence Against Women Act, 42 U.S.C. § 13981, Congress assumed unique power. It asserted a power over "commerce" that leaves no meaningful limit on national regulation of all manner of local regulatory matters, except an increasingly dormant proclivity for self-restraint. And it asserted an enforcement authority that simply does not do the normal things that section 5 laws do. Even the most well-meaning policy objectives

should not be allowed to circumvent these foundational restrictions on the creation of a Federal police power.

1. As a matter of constitutional word choice and precedent, to say nothing of sheer common sense, tort remedies for gender violence no more involve the regulation of interstate "commerce" than do any other provision of State criminal, tort or family law. The section has far fewer commercial qualities than the guns-around-schools legislation invalidated in *United States v. Lopez*, 514 U.S. 549 (1995). And unlike the legislation upheld in *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964), it has no parallel to the assuredly commercial act of not allowing a group of individuals to purchase goods or services. The civil-remedy provision simply does not "substantially affect" interest commerce, at least if this limit on congressional authority is to retain any meaningful content and if this Court is to retain any meaningful role in finally interpreting the commerce clause.

2. Likewise, only a decision to ignore the text of the Fourteenth Amendment and to break with more than 100 years of precedent would allow the Court to sustain the provision under Congress's section 5 enforcement authority. Whether one considers nineteenth-century precedents, *United States v. Harris*, 106 U.S. 629 (1883), the *Civil Rights Cases*, 109 U.S. 3 (1883), or twentieth-century ones, *City of Boerne v. Flores*, 521 U.S. 507 (1997), *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199 (1999), all show that Congress's "remedial" power under section 5 may not be invoked when there are no constitutional violations to correct. Because the Fourteenth Amendment regulates State action, not private conduct, and because there has been no tenable showing that the States have violated the Fourteenth Amendment through their regulation of private acts of gender-based violence, section 5 does not support this farreaching measure. As the federal government itself

acknowledges (U.S. Br. 58-59 n.29), the provision "does not operate against the States at all," confirming that a decision upholding this law would break not only with section five precedent but also with this Court's long-understood State-action doctrine.

ARGUMENT

Section 13981 of Title 42 of the United States Code creates a federal civil cause of action against any "person . . . who commits a crime of violence motivated by gender . . . for the recovery of compensatory and punitive damages, injunctive and declaratory relief." The law defines "crime of violence" to cover any "felony" under "State or Federal" law against another person, and defines "motivation by gender" to mean a violent crime "committed because of gender . . . and due, at least in part, to an animus based on the victim's gender." 42 U.S.C. §§ 13981(c), (d)(1) & (2). Unlike other provisions of the VAWA, *see* 18 U.S.C. §§ 2261-62, the section does not contain a jurisdictional provision requiring the "crime of violence" to be interstate in nature. In enacting the law, Congress drew on two purported sources of authority — the commerce clause and section 5 of the Fourteenth Amendment. 42 U.S.C. § 13981(a). Neither one suffices, however, to support this unprecedented and in the end unbounded assumption of federal power.

I. THE CIVIL-REMEDY PROVISION OF THE VAWA CANNOT BE SUSTAINED AS A LAW DESIGNED "TO REGULATE COMMERCE . . . AMONG THE SEVERAL STATES."

A. The Words Of The Commerce Clause Do Not Support National Tort Legislation For Intrastate Crimes.

"The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

U.S. Const., art. I, § 8, cl. 3.

By its terms, the "Power . . .To regulate Commerce . . . among the several States" does not remotely establish authority to create a national damages action for intrastate felonies involving gender violence. At the time the Constitution was written and ratified, the term "commerce" merely involved "trade or traffic," Nathaniel Bailey, *An Universal Etymological English Dictionary* (26th ed. 1789), and concerned an "[e]xchange of one thing for another," Thomas Sheridan, *A Complete Dictionary of the English Language* (6th ed. 1796). Modern dictionaries confirm that nothing has changed. They, too, read the term in this way. *See Random House Webster's Unabridged Dictionary* (2d ed. 1997) ("an interchange of goods or commodities, esp. on a large scale between different countries (foreign commerce) or between different parts of the same country (domestic commerce)").

By any recognizable standard of meaning, it is difficult to ascribe a state of mind to the drafters of the clause that would make sense out of extending a national power to regulate "an interchange of goods or commodities" "among the several States" to tort remedies for intrastate crimes based on gender animus. Still less is it possible to do so for the people who ratified the clause and had only the words of the provision to go by.

Context compels a like conclusion. Besides interstate commerce, the commerce clause also empowers Congress to "regulate Commerce with foreign Nations . . . and with the Indian Tribes." Yet, in doing so, the noun "commerce" surely has the same meaning when used in the same clause of the same section of the same article. A reading of the term, however, that permits regulation of activities beyond the "interchange of goods or commodities" makes even less sense with regard to international and Indian affairs than it does with regard to interstate activities. No amount of word play permits the conclusion that the clause creates a general police (or tort)

power over conduct occurring within foreign nations and tribal lands.

Elsewhere in Article I, the Constitution uses the word "commerce" in establishing that "no Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another." U.S. Const., art. I, § 9, cl. 6. Again, the term plainly refers to an "interchange of goods or commodities" — in this instance, as discriminatorily regulated by one State port relative to another. *Cf.* U.S. Const., art. I, § 8, cl. 10 (empowering Congress "To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations"). Add to these contextual clues the decision of the Framers to specify the existence of certain National legislative powers at all, necessarily implying the absence of other powers, *see* art. I, § 1 (referring just to the powers "herein granted"), and it becomes clear that the clause cannot sustain this farreaching law. An intertextual analysis in the end offers no support, or even a linguistic hint, that the ratifiers of the commerce clause meant to permit its invocation in the setting of tort remedies for intrastate felonies involving gender violence.

B. Precedent Forecloses The Exercise of An Unlimited Commerce Power.

The Court's commerce clause precedents also defeat this novel exercise of congressional authority. Proving that it is easier to write a Constitution than to interpret it, the Court's cases to be sure have taken several Hegelian turns in ascertaining the amount of intrastate commercial activity that will suffice to permit congressional lawmaking in this area. But one interpretive turn that the Court has never taken is to construe the power to regulate commerce to include a general police power over local crimes, torts, family law and other social matters. Because this single section of the VAWA attempts to traverse that line, no amount of deference to congressional expertise can sustain this Rubicon-crossing law.

Time and again, the Court has reminded Congress that its commerce powers are not unlimited. As a matter of "first principles," the "Constitution creates a Federal Government of enumerated powers," all of which — the commerce clause included — are "subject to outer limits." *Lopez*, 514 U.S. at 557. An unwavering line of precedents confirms the Court's steadfast adherence to this foundational tenet:

* "It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. . . . Comprehensive as the word among is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824).

* The clause does not "obliterate the distinction between what is national and what is local and create a completely centralized government." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

* "The question is necessarily one of degree," and the clause applies to those intrastate activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions." *Jones & Laughlin*, 301 U.S. at 36-38.

* "The activities that are beyond the reach of Congress are 'those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.'" *Katzenbach v.*

McClung, 379 U.S. 294, 302 (1964) (quoting *Gibbons*, 22 U.S. (9 Wheat) at 195).

* "[T]he power to regulate commerce, though broad indeed, has limits" which "the Court has ample power" to enforce. *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968), *over'd on other grounds*, *National League of Cities v. Usery*, 426 U.S. 833 (1976), *over'd*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

* The Constitution remains "an instrument of limited and enumerated powers," and "[n]o one disputes the proposition that the Constitution created a Federal Government of limited powers." *New York v. United States*, 505 U.S. 144, 155-56 (1992) (quotation omitted).

* "To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567.

* "[T]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *Lopez*, 514 U.S. at 552 (quoting *The Federalist* No. 45 (J. Madison)).

With this constant in mind, the Court has construed the commerce clause to permit Congress to regulate just three areas of commercial activity: (1) the use of the channels of interstate commerce; (2) the instrumentalities of, or persons or things in, interstate commerce; and (3) other activities that "substantially affect" interstate commerce. *Lopez*, 514 U.S. at 557-59. It is common ground that section 13981 is not covered by the first two commerce clause safe harbors.

As to the last inquiry, which was also the only one at stake in *Lopez*, two bookend questions predominate — (1) whether

a legitimate rationale exists for concluding that the activity "substantially affects" interstate commerce as the Court has defined those terms, *see Lopez*, 514 U.S. at 557 n.2, 562, and (2) whether that rationale "would convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States," *id.* at 567. *See id.* at 564 ("Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."); *id.* (asking whether "acceptance of the Government's rationales would . . . authorize a general federal police power"). *Cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992) (law cannot be justified by a governmental "interest" "[t]hat is precisely what the First Amendment forbids"); *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (asserted "governmental interest [must be] unrelated to the suppression of free expression"). Short of a "substantial effects" rationale that meaningfully confines congressional power under the commerce clause, in other words, the law exceeds Congress's authority.

In applying the "substantial effects" test in *Lopez*, the Court concluded that the law failed both requirements. One, there was no plausible explanation why the Gun-Free School Zones Act substantially affected interstate commerce. The law was a "criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." 514 U.S. at 561. It was not "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* And it "contain[ed] no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Id.*

Two, every rationale offered to sustain the law violated the overriding principle linking the Court's commerce clause cases — that, whatever the explanation for the exercise of

power, it cannot convert a commerce power of limited reach into one of unbounded breadth. *Id.* at 563-68. The government, for example, argued that firearms possession in a school zone could result in violent crime, which in turn could create substantial insurance costs throughout the country or create disincentives to travel to parts of the country that appeared to be unsafe. *Id.* at 563-64. It also argued that firearms possession in a school zone could threaten the learning environment, which in turn could result in a less productive citizenry. *Id.* at 564.

The problem with both rationales, the Court concluded, was that it "was hard pressed to posit any activity by an individual that Congress is without power to regulate" under these explanations. *Id.* Under the "cost of crime" approach, "Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Id.* And under the "national productivity" theory, any activity that Congress "found was related to the economic productivity of individual citizens" would be fair game, including such "family law" issues as "marriage, divorce, and child custody." *Id.*

C. This Provision Does Not Meet The "Substantial Effects" Test, And Has Even Less Connection To Interstate Activity Than The Guns-Free School Zone Act Invalidated In *Lopez*.

Measured against this standard, section 13981 of the VAWA clearly fails. First, as in *Lopez*, the law on its face provides a tort remedy for a criminal violation that "by its terms has nothing to do with 'commerce' or any sort of economic enterprise." 514 U.S. at 561. The covered acts are inherently local in nature, and involve precisely the kinds of criminal, tort and family law policy choices that State governments have historically been responsible for making. Nothing about the law or its terms suggests any economic or commercial activity. Nor, in contrast to *Wickard v. Filburn*,

317 U.S. 111 (1942), is the provision "part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561. Quite the opposite is true. The civil-remedy provision of VAWA stands conspicuously apart from the rest of this extensive legislative package, which either involves regulations with explicit interstate components or contains direct authorization for federal funding. The law also lacks any "jurisdictional element" which "might limit its reach to a discrete set of" gender-related crimes "that additionally have an explicit connection with or effect on interstate commerce." *Id.* at 561-62.

Second, the rationales offered by the federal government for meeting the "substantial effects" test fail to circumvent the same pitfall that doomed the law at issue in *Lopez*. They, too, have no stopping point, and accordingly provide no assurance that the law is not an impermissible seizure of national power dressed in interstate commerce clothing.

The supposed commercial bases of the law (U.S. Br. 20) are that violence based on gender animus (1) "deters people from seeking jobs, including jobs in interstate businesses, that would require them to work at certain hours or in certain places," (2) inhibits people from "travelling . . . and from engaging in other interstate activity," (3) impedes "victims' ability to work at all," creating homelessness, poverty, and dependence, and (4) imposes "increased medical and other costs on victims, their employers and insurers, and state and local governments." These rationales are of a piece with those expressed in *Lopez*. Every one of them would apply with equal force to every felony in existence, whether motivated by gender-based animus or not, and no matter "how tenuously they relat[ed] to interstate commerce." *Lopez*, 514 U.S. at 564. All violent crime, as any victim will attest, runs the risk of deterring its victims from seeking jobs, travelling, working at all, and imposing an assortment of other economic and non-economic

costs. To accept these attenuated connections to interstate commerce would require the Court to do what it refused to do in *Lopez* or in any other commerce clause case — abandon the view that "the Constitution's enumeration of powers . . . presuppose[s] something not enumerated" and in the process abandon the "distinction between what is truly national and what is truly local." *Id.* at 567-68.

As in *Lopez*, the law also seizes authority over areas that the States have as a matter of tradition and custom governed for themselves. To begin with, the "States possess primary authority for defining and enforcing criminal law." *Lopez*, 514 U.S. at 561 n.3 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)) (internal quotation omitted). And when "Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between federal and state criminal jurisdiction." *Id.* (quoting *United States v. Emmons*, 410 U.S. 396, 411-12 (1973)) (internal quotation omitted). That "sensitive relation" is "change[d]" regardless of whether Congress redefines criminal conduct, as in *Lopez*, or supplies new enforcement remedies for that conduct, as in this instance.

Not only does section 13981 concern criminal conduct that the States uniformly punish, but it also creates a civil remedy where one already exists. As the Appendix to this brief confirms, all States permit tort and other remedies for such violent acts, making the VAWA provision as superfluous as it is invasive. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (noting "States' traditional authority to provide tort remedies to its citizens"). To the extent some States still retain inter-spousal tort immunities for these actions — today, just two, *see* Appendix — VAWA's attempt to override those immunities merely confirms its displacement of core local regulation of family law issues that it has never been the province of Congress to supersede. *See Rose v. Rose*, 481 U.S. 619, 625 (1987) ("[w]e have consistently recognized that

. . . domestic relations . . . belong[] to the laws of the States and not to the laws of the United States") (citation and quotation omitted). All things considered, the provision's needless overlap with some State criminal, tort and family law requirements, together with its overriding of several others, makes it as unnecessary as it is improper.

Nor do *McClung* and *Heart of Atlanta Hotel* change things. In neither case, contrary to petitioners' arguments, did the Court sustain the legislation merely because it amounted to civil rights legislation. Rather, the Court upheld the provisions only after explaining their close links to interstate commerce. *See Heart of Atlanta Motel*, 379 U.S. at 250 (the law "is carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people"); *McClung*, 379 U.S. at 304 ("Congress prohibited discrimination only in those establishments having a close tie to interstate commerce"). And, most assuredly, application of the federal laws to both cases had the requisite nexus to interstate commerce. The decision not to sell goods and services to an entire class of individuals is in its very nature a commercial act, and a decidedly immoral one as well.

As a matter of precedent, then, while the VAWA provision suffers from the same types of defects that compelled invalidation of the Gun-Free School Zones Act in *Lopez*, it differs on its face from every other federal law the Court has upheld in this area, including the most farreaching regulations of intrastate activities. This tort remedy does not approach such prototypical economic activities as intrastate coal mining, *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), intrastate extortionate credit transactions, *Perez v. United States*, 402 U.S. 146 (1971), inns and hotels catering to interstate guests, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), restaurants using substantial interstate supplies, *Katzenbach v. McClung*, 379 U.S. 294 (1964), or the production and consumption of home-

grown wheat, *Wickard v. Fillburn*, 317 U.S. 111 (1942). The commercial nature of these activities simply has no parallel to the intrastate tort created by VAWA. The societal problems that create gender violence have no more to do with interstate commerce than do the problems of high school drop-out rates, high divorce rates or dysfunctional families.

That leaves the problem that Congress felt differently about the matter. Yes, Congress conducted extensive findings regarding the alleged impact of gender-animus-based crimes on interstate commerce. And, yes, those findings are entitled to deference. But, in this respect, the case is merely a variation on a theme of *City of Boerne v. Flores*. As that case teaches, neither the competence of the National legislature nor any State legislature to make empirical findings about a social, civil rights or commercial issue permits one or the other to invade "the province of the Judicial Branch . . . 'to say what the law is.'" 521 U.S. at 536 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). And no amount of factfinding can alter that conclusion. Thus, in reviewing section 5 legislation, the Court decides what amounts to a violation, while Congress receives substantial deference over the remedy, and the Court decides whether the predicate for prophylactic legislation exists while Congress receives substantial deference over the extent of the remedy. So, too, under the Commerce Clause. The Court decides the meaning of "substantial effects" on interstate commerce while Congress receives broad deference regarding the appropriate legislation to enact within that sphere.

To permit legislative factfindings, by any branch of government, to obtain more deference that this has no fathomable limit. It would make any legislator, or for that matter any aide with a laptop, potentially the final dispositor of what the Constitution means — a double insult to the Constitution's allocation of a final interpretive power to this Court and of a plenary police power to the States. This limitation is no less important under the commerce clause than

it is under section 5 of the Fourteenth Amendment, particularly given the potential of factfindings regarding "effects" on interstate commerce to outpace any meaningful limit on federal power. Respect for the constitutional judgment of a coordinate branch of government is one thing; blind deference is another.

It thus made no difference in *City of Boerne* that the Congress had spent as much time as it did here, if not more, compiling an empirical record regarding the impact of generally applicable laws on the free exercise of religion. It still fell to the Court to decide whether the Religious Freedom Restoration Act was permissible section 5 legislation, and more concretely whether it responded to a pattern and practice of constitutional violations and did so in a proportional and congruent way.

The same need for judicial review of the political branches of government applies here. The VAWA congressional findings all proceed at such an imposing level of generality that it is difficult to imagine what intrastate crime, tort, or family law issue would not be covered by them. To borrow a page from tort law, there is a considerable difference between causation in fact and proximate cause. Most of the congressional findings, granted, make a plausible case for the position that intrastate acts of violence, whether motivated by gender or not, will like a rock thrown into a pond have effects that lead to other effects that potentially affect interstate commerce. *Cf. Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 103 (N.Y. 1928). But those findings simply do not establish a proximate relationship between the underlying crime and a substantial effect on interstate commerce. To hold otherwise would abandon the Court's "independent evaluation of constitutionality under the Commerce Clause." *Lopez*, 514 U.S. at 562. Congress's findings in the last analysis entitle it to respect, not hegemony. Because the congressional findings here operate at such a high level of generality that they would empower Congress to regulate "any activity by an individual,"

id. at 564, they simply do not suffice. Section 13981 is not permissible commerce clause legislation.

II. A NATIONAL TORT REMEDY FOR PRIVATE ACTS OF GENDER-MOTIVATED VIOLENCE DOES NOT CONSTITUTE PERMISSIBLE ENFORCEMENT LEGISLATION UNDER SECTION 5.

Congress also invoked section 5 of the Fourteenth Amendment in enacting this provision. In the legislature's view, bias and discrimination against women in the States' criminal justice systems "often depriv[e] victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled," making the provision "necessary to guarantee equal protection of the laws." H.R. Conf. Rep. No. 103-711, at 385, *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853. Yet even the most modest scrutiny of this law confirms that it remedies complex social and criminal justice concerns, not constitutional violations. Accordingly, it cannot be justified (1) under Congress's unconditional authority to proscribe and remedy what the Fourteenth Amendment already proscribes or (2) under Congress's conditional authority to "prohibit[] conduct which is not itself unconstitutional." *City of Boerne*, 521 U.S. at 518 (citation omitted).

A. Section 5 Is A Remedial Power.

> Section 1 . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV, §§ 1, 5.

In word and design, the section 5 enforcement power is a "remedial" one. *City of Boerne*, 521 U.S. at 519. Judicial review of such legislation thus begins by "identify[ing] the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy." *Florida Prepaid*, 119 S. Ct. at 2207. The Court then asks whether the legislation merely bans violations of the Fourteenth Amendment as the Court has defined them, or exceeds those requirements in order prophylactically to "remedy" past violations or "prevent" future ones.

All congressional remedies must reflect a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 at 519-20. And an effort prophylactically to ban what the Constitution does not requires a predicate "pattern or practice of unconstitutional conduct." *Id.* at 534; *Florida Prepaid*, 119 S. Ct. at 2207. At all events, no section 5 right exists in the absence of a cognizable section 1 wrong.

B. Section 13981 Lacks The Requisite Hallmarks Of Either Traditional Or Prophylactic Section 5 Legislation.

1. The Provision Cannot Be Sustained As Traditional Enforcement Legislation.

By any measure, it cannot tenably be argued that section 13981 targets conduct that itself violates the Fourteenth Amendment. The provision creates a tort cause of action against private parties who commit gender-motivated crimes and does so with no regard to whether the State participated in the activity or otherwise violated the individual's Fourteenth Amendment rights. On this basis alone, the law cannot be justified on the ground that it merely asks the States to do what the Equal Protection Clause already requires.

It is beyond debate that private conduct, even criminal conduct, does not implicate the Fourteenth Amendment, which

by its terms ("No State shall . . .") imposes restrictions on the States, not on private individuals. "This has been the view of the Court from the beginning," and it "remains the Court's view today." *United States v. Guest*, 383 U.S. 745, 755 (1966). "Because the Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as 'state action.'" *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982). No such characterization can be made of violent crimes committed by one private individual against another, particularly when the section 5 tort remedy exists regardless of the State's efforts to prosecute the crime and regardless of the State's efforts legislatively to provide the victim with a civil remedy. *See* Appendix.

2. The Provision Also Is Not Permissible Prophylactic Legislation.

Nor does section 13981 constitute a legitimate exercise of Congress's "prophylactic" power to "prohibit[] conduct which is not itself unconstitutional." *City of Boerne*, 521 U.S. at 518 (citation omitted). Unlike "proper prophylactic § 5 legislation," this civil remedy does not anticipate or "respond to a history of 'widespread and persisting deprivation of constitutional rights.'" *Florida Prepaid*, 119 S. Ct. at 2210 (quoting *City of Boerne*, 521 U.S. at 526). Whether one considers past equal protection violations or potential future ones, the Federal and State case reporters are conspicuously silent about actual or even alleged State violations of equal protection stemming from the administration, enforcement and prosecution of gender-related crimes.

Except for a smattering of highly-generalized and conclusory statements in the congressional record about the inadequacies of State criminal justice systems in this area, the record is utterly devoid of support for the notion that the States have brought these extra-constitutional requirements on themselves by violating the constitutional rights of their citizens. Even the States that have supported the law have not claimed that it is

necessary to remedy constitutional violations that they or anyone else has committed. *See* Brief *Amici Curiae* of Arizona, *et al.*

Nor on its face does the provision even pretend to be section 5 legislation. The VAWA remedy, unlike every other section 5 remedy ever upheld, runs not against the alleged constitutional wrongdoer — the State — but against the criminal. That of course may make good policy sense, but hardly accords with the section 5 directive to remediate *State* violations of the Fourteenth Amendment.

Against the backdrop of the State-action doctrine, it takes great ingenuity just to conceive of fact patterns that would legally establish State violations of equal protection. But, importantly, neither this Court nor any other (to our knowledge) has ever reduced such theoretical speculations to concrete decisions by the State or Federal courts. Whatever quantum of deference Congress receives in exercising this remedial power, prophylactic section 5 laws cannot be sustained on the basis of violations that do not exist. On this record, Congress simply lacked the predicate pattern of actual or empirically-threatened constitutional violations necessary to impose these extra-constitutional obligations.

C. Precedent Forecloses Congress's Reliance On Section 5 To Sustain This Tort Remedy.

Precedent from this century and the last also undermines this assertion of section 5 authority. *City of Boerne* and *Florida Prepaid* both invalidated legislation that did not respond to a record of constitutional violations and that was disproportionate to any alleged harm. Yet even these laws involved the existence of *some* isolated examples of unconstitutional State action, placing the VAWA civil remedy even further outside the realm of constitutionality than the laws invalidated in these cases.

Not long after ratification of the Fourteenth Amendment, the Court also issued two other decisions that speak to this one — *United States v. Harris*, 106 U.S. 629 (1883), and the *Civil Rights Cases*, 109 U.S. 3 (1883). In both, the Court invalidated purported section 5 legislation that, like section 13981 of the VAWA, reached only private action. *Harris* invalidated section two of the Civil Rights Act of 1871, which said that a person could not "conspire" to "depriv[e] . . . any person . . . of the equal protection of the laws." 106 U.S. at 632. Applying traditional State-action doctrine, the Court said that the Fourteenth Amendment

> is a guaranty of protection against the acts of the State government itself. It is . . . not a guaranty against the commission of individual offenses; and the power of Congress . . . to legislate for the enforcement of such a guaranty, does not extend to the passage of laws for the suppression of crime within the States.

Id. at 638 (quotation omitted). Because section 5 "does not add anything to the rights of one citizen against another" and because "[t]he only obligation resting upon the United States is to see that the States do not deny the right . . . and no more," *id.*, the Court refused to sustain the law under section 5.

The *Civil Rights Cases*, for like reasons, invalidated the public-accommodations provisions of the Civil Rights Act of 1875, which created a private right of equal access to "inns, public conveyances . . . and other places of public amusement," along with private causes of action for damages against those who violated the requirement. 109 U.S. at 9. Section 5, the Court held, "does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action." *Id.* at 11-12. Otherwise, Congress could promulgate a "code of municipal law regulative of all private rights between man and man in society," which would allow Congress to "take the place of the State legislatures and . . .

supersede them," *id.* at 13, in a way that was "repugnant to the Tenth Amendment of the Constitution." *Id.* at 15. While laws similar to the ones invalidated in *Harris* and the *Civil Rights Cases* have since been upheld under other constitutional provisions, *City of Boerne* makes clear that the section 5 analyses in both cases remain valid. *See City of Boerne*, 521 U.S. at 524-25, 532-33. *See also Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 384-85 (1979) (Stevens, J., concurring) ("Thus, while § 1985(3) does not require that a defendant act under color of state law, there still can be no claim for relief based on a violation of the Fourteenth Amendment if there has been no involvement by the State. The requirement of state action, in this context, is no more than a requirement that there be a constitutional violation."); *id.* at 378-79, 381 (Powell, J., concurring) (the Constitution does not "create any right to be free of gender-based discrimination perpetuated solely through private action"). Both the text of the Fourteenth Amendment and precedent defeat this exercise of section 5 authority.

III. THE INVALIDATION OF ONE PROVISION OF THE MULTI-SECTION VAWA PRESERVES OUR DUAL SOVEREIGNTY, AND CONFIRMS THAT FEDERALISM IS ONE AMONG MANY COUNTER-MAJORITARIAN GUARANTEES THAT PRESERVE LIBERTY.

In the face of considerable congressional testimony regarding the alleged inadequacies of State criminal justice systems in this area, it asks too much to refrain from pointing out that the States' hands are not entirely free in remediating and deterring gender-motivated violence. Indeed, much of the Court's work over the last 50 years has been prompted by States that conducted criminal investigations too vigorously or were otherwise too zealous in the enforcement of their criminal laws.

Case after case imposes counter-majoritarian limitations on the States when it comes to local efforts to ferret out and punish crime, or even to curb the underlying social problems that prompt gender violence. Under the Fifth Amendment, voluntary admissions of guilt may be suppressed in the absence of warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), a case that arose from an overly-vigorous investigation of an alleged rapist. Under the Eighth Amendment, States may not impose capital punishment solely for rape. *See Coker v. Georgia*, 433 U.S. 584 (1977). Under the Fifth Amendment, the States may not impose a criminal sanction, then add a punitive civil sanction for gender-related or any other crimes. *See United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984). *See Whalen v. United States*, 445 U.S. 684 (1980) (imposition of consecutive sentences for rape and murder violated double jeopardy clause). Under the Fourth Amendment, evidence of wrongdoing may be suppressed and the criminal allowed to go free whenever the incriminating evidence represents the fruit of an "unreasonable search and seizure." *Mapp v. Ohio*, 367 U.S. 643 (1961). *See also, e.g., Hayes v. Florida*, 470 U.S. 811 (1985) (reversing sexual battery conviction in light of Fourth Amendment violation). Under the Sixth Amendment, the accused has an assortment of jury trial rights, including ultimately the right of jury nullification, as well as rights under the Confrontation Clause, which impose substantial hurdles when it comes to the prosecution of gender-related crimes. *See Brady v. Maryland*, 373 U.S. 83 (1963). *See also Holloway v. United States*, 435 U.S. 475 (1978) (reversing rape conviction due to assistance of counsel violation). Federal habeas law also independently imposes other limitations on the States' efforts in these areas. *See, e.g., Kimmelman v. Morrison*, 477 U.S. 365 (1986) (granting habeas relief to convicted rapist). And perhaps most importantly in the area of gender-related violence, the First Amendment places imposing restrictions on State efforts to strike at the underlying causes of such conduct — making it

difficult for States to restrict the release of movies or television shows with excessive violence and sex, to regulate access to indecent activities on the internet, to curb sales of exploitative magazines, or to bar some types of nude or even semi-nude dancing. *See Reno v. ACLU*, 521 U.S. 844 (1997); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968); *Kingsley Internat'l Pictures Corp. v. Regents of the Univ. of N.Y.*, 360 U.S. 684 (1959). Even the most well-meaning and capable of State lawmakers thus face a daunting task in trying to solve this urgent social problem while navigating these doctrinal shoals.

The point of all this is not to question these rulings, but to embrace them. They confirm the essential point of this brief, namely, that even the most virtuous public policy objectives — making society safe for law-abiding citizens or rooting out gender-motivated violence — have appropriate limitations. The history of judicial review is the history of safeguarding structural and individual-rights guarantees of liberty against the exigencies of the moment. Just as the Court has not hesitated to vindicate individual-liberty rights against society's need for collective security and has not hesitated to ensure an appropriate separation of powers among the National branches of government, it should not hesitate here to vindicate the modest, but foundational, principle that Congress has limited and enumerated powers. The libertarian objective of the Framers after all was to "split the atom of sovereignty," *Saenz v. Roe*, 119 S. Ct. 1518, 1527 n.17 (1999) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)), not to multiply it.

Far from protecting State sovereignty for it own sake, then, the transcendent goal of federalism is to advance the unique brand of American freedom that only divided and dispersed government can provide. "[A] healthy balance of power between the States and the Federal Government will reduce the

risk of tyranny and abuse from either front. . . . In the tension between federal and state power lies the promise of liberty." *Gregory v. Ashcroft*, 501 U.S. 452, 458-59(199). While it is assuredly difficult to uphold this federalist abstraction in the face of concrete laws designed to protect religious liberties, to remove guns from schools or to remedy gender violence, it is doubtful whether any other branch of government is equipped to do so.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

STATE CIVIL ACTIONS AND CRIMINAL PROVISIONS		
	Alabama	**Alaska**
Anti-Stalking Laws	YES Ala. Code § 13A-60-90	YES Alaska Stat. §§ 11.41.260 & 41.270
Warrantless Arrest for Domestic Violence	YES § 15-10-3	YES § 12.25.030(b)
Protective Orders	YES § 30-5-1, *et seq.*	YES § 18.66.100
Civil Tort: Assault/Battery	YES* 489 So.2d 1097	YES 985 P.2d 460
Civil Tort: Intentional Infliction of Emotional Distress	YES 394 So.2d 361	YES 705 P.2d 454

* *E.g.*, *Murray v. Murray*, 598 So.2d 921 (Ala. Ct. App. 1992) (wife recovered $55,000 from husband who physically abused her).

	Arizona	Arkansas
Anti-Stalking Laws	YES Ariz. Rev. Stat. § 13-2923	YES Ark. Code Ann. § 5-71-229
Warrantless Arrest for Domestic Violence	YES § 13-3601 (B)	YES § 16-81-113
Protective Orders	YES § 13-3602	YES § 9-15-201, *et seq.*
Civil Tort: Assault/Battery	YES 923 P.2d 875	YES* 914 S.W.2d 285
Civil Tort: Intentional Infliction of Emotional Distress	YES 578 P.2d 152	YES 596 S.W.2d 681

* *E.g., Cater v. Cater*, 846 S.W.2d 173 (Ark. 1993) (wife recovered $370,000 for assault and battery by husband).

	California	Colorado
Anti-Stalking Laws	YES Cal. Penal Code § 646.9	YES Colo. Rev. Stat. § 18-9-111 4(a)(I)(II)
Warrantless Arrest for Domestic Violence	YES Cal. Penal Code §§ 273.5 & i3701	YES § 18-6-803.6
Protective Orders	YES Fam. Code § 6240, *et seq.*, § 6320, *et seq.*; Penal § 273.6	YES 14-4-101, *et seq.*
Civil Tort: Assault/Battery	YES 31 Cal. Rptr.2d 259	YES 919 P.2d 910
Civil Tort: Intentional Infliction of Emotional Distress	YES 240 P.2d 282	YES 645 P.2d 292

	Connecticut	Delaware
Anti-Stalking Laws	YES Conn. Gen. Stat. § 53a-181(c)(d)(e)	YES Del. Code tit. 11, § 1312A
Warrantless Arrest for Domestic Violence	YES § 46b-38b	YES tit. 11, § 1904
Protective Orders	YES § 46b-15	YES tit. 10, § 1041, *et seq.*
Civil Tort: Assault/Battery	YES 362 A.2d 798	YES 668 A.2d 1355
Civil Tort: Intentional Infliction of Emotional Distress	YES 510 A.2d 1337	YES 574 A.2d 843

	D.C.	Florida
Anti-Stalking Laws	YES D.C. Code § 22-504	YES Fla. Stat. Ann. § 784.048
Warrantless Arrest for Domestic Violence	YES § 16-1031(a)	YES § 901.15(6)
Protective Orders	YES § 16-1001	YES § 741.30 & .31
Civil Tort: Assault/Battery	YES 412 A.2d 948	YES 660 So.2d 350
Civil Tort: Intentional Infliction of Emotional Distress	YES 580 A.2d 660	YES 373 So.2d 956

	Georgia	Hawaii
Anti-Stalking Laws	YES Ga. Code § 16-5-90, *et seq.*	YES Haw. Rev. Stat. § 711.1106, *et seq.*
Warrantless Arrest for Domestic Violence	YES § 17-4-20(a)	YES §§ 709-906(4), 803-5
Protective Orders	YES § 19-13-3	YES § 586-4
Civil Tort: Assault/Battery	YES* 428 S.E.2d 431	YES 375 P.2d 229
Civil Tort: Intentional Infliction of Emotional Distress	YES** 409 S.E.2d 835	YES 643 P.2d 532

* Except for claims barred by interspousal tort immunity. *See* Ga. Code Ann. § 53-501.

***Compare id. with Catlett v. Catlett*, 388 S.E.2d 14 (Ga. Ct. App. 1989) (ex-wife recovered $20,000 for assault, battery and false imprisonment).

	Idaho	Illinois
Anti-Stalking Laws	YES Idaho Code § 18-7905	YES Ch. 720 Ill. Comp. Stat. 5/12-7.3
Warrantless Arrest for Domestic Violence	YES § 19-603(6)	YES Ch. 40 ¶ 2303-1
Protective Orders	YES § 39-6301, *et seq.*	YES Ch. 750 § 60/201 *et seq.*
Civil Tort: Assault/Battery	YES 718 P.2d 1167	YES 648 N.E.2d 329
Civil Tort: Intentional Infliction of Emotional Distress	YES* 606 P.2d 944	YES 174 N.E.2d 157

* *E.g., Curtis v. Firth*, 850 P.2d 749 (Idaho 1993) (affirming $1 million award for emotional distress and battery).

	Indiana	Iowa
Anti-Stalking Laws	YES Ind. Code § 35-45-10, *et seq.*	YES Iowa Code § 708.11
Warrantless Arrest for Domestic Violence	YES § 35-33-1-1	YES § 236.12(2)
Protective Orders	YES § 34-26-2-1, *et seq.*	YES § 236.1, *et seq.*
Civil Tort: Assault/Battery	YES* 570 N.E.2d 27	YES 567 N.W.2d 414
Civil Tort: Intentional Infliction of Emotional Distress	YES 570 N.E.2d 27	YES 203 N.W.2d 252

* *E.g.*, *Landis v. Landis*, 664 N.E.2d 754 (Ind. App. 1996) (affirming $538,000 award for emotional distress, assault and battery).

	Kansas	Kentucky
Anti-Stalking Laws	YES Kan. Stat. Ann. § 21-3438	YES Ky. Rev. Stat. § 508.130-150
Warrantless Arrest for Domestic Violence	YES § 22-2401	YES § 431.005(2)
Protective Orders	YES § 60-3101, *et seq.*	YES §§ 403.715-403.785, 209.01-209.16
Civil Tort: Assault/Battery	YES 645 P.2d 916	YES 945 S.W.2d 948
Civil Tort: Intentional Infliction of Emotional Distress	YES 645 P.2d 916	YES 671 S.W.2d 247

	Louisiana	Maine
Anti-Stalking Laws	YES La. Rev. Stat. Ann § 14:40.2	YES Me. Rev. Stat. tit. 17A, § 506-A
Warrantless Arrest for Domestic Violence	YES § 46:2140, art. 1573	YES tit. 19, § 770(5) tit. 7 § 15(a)(A)(5-a)
Protective Orders	YES § 46:2131-2142	YES tit. 15 § 321, 19A § 4001 *et seq.*
Civil Tort: Assault/Battery	YES* 512 So.2d 389	YES 704 A.2d 383
Civil Tort: Intentional Infliction of Emotional Distress	YES 585 So.2d 1205	YES** 401 A.2d 148

* Except for claims brought during a marriage because they are barred by interspousal tort immunity. *See Duplechin v. Toce*, 497 So.2d 763 (La. Ct. App. 1986). *But see Sumrall v. Sumrall*, 612 So.2d 1010 (La. Ct. App. 1993) (estranged wife recovered $43,000 after beating).

** *E.g.*, *Henrikson v. Cameron*, 622 A.2d 1135 (Me. 1993) (affirming $115,000 damage award for intentional infliction of emotional distress).

	Maryland	Massachusetts
Anti-Stalking Laws	YES Md. Code art. 27, § 23.	YES Mass. Gen. Laws Ann. ch. 265, § 43
Warrantless Arrest for Domestic Violence	YES art. 27, § 29-404.02(3)	YES ch. 209A, § 6(7)
Protective Orders	YES Family Law § 4-501, *et seq.* 45-5-096	YES 2049A § 1, *et seq.*; 208 § 34C
Civil Tort: Assault/Battery	YES 588 A.2d 760	YES 616 N.E.2d 1091
Civil Tort: Intentional Infliction of Emotional Distress	YES* 380 A.2d 611	YES 392 N.E.2d 1053

* *E.g. Lusby v. Lusby*, 390 A.2d 77 (Md. 1978) (wife could bring tort action against husband for violent attack and attempted rape)

	Michigan	Minnesota
Anti-Stalking Laws	YES Mich. Comp. Laws §§ 750.411(h), (i); 600.2954	YES Minn. Stat. § 609.749
Warrantless Arrest for Domestic Violence	YES § 764.15.a	YES § 629.34
Protective Orders	YES §§ 600.2950, 600.2950a	YES § 518B.01
Civil Tort: Assault/Battery	YES 350 N.W.2d 772	YES 601 N.W.2d 199
Civil Tort: Intentional Infliction of Emotional Distress	YES 551 N.W.2d 206	YES 330 N.W.2d 428

	Mississippi	Missouri
Anti-Stalking Laws	YES Miss. Code § 97-3-107	YES Mo. Ann. Stat § 455.010, *et seq.*
Warrantless Arrest for Domestic Violence	YES § 99-3-7	YES § 455.085(1)
Protective Orders	YES § 93-21-1, *et seq.*	YES § 455.01, *et seq.*
Civil Tort: Assault/Battery	YES 518 So.2d 1205	YES 974 S.W.2d 513
Civil Tort: Intentional Infliction of Emotional Distress	YES 680 So.2d 803	YES 396 S.W.2d 566

	Montana	Nebraska
Anti-Stalking Laws	YES Mont. Code Ann. § 44-5-220	YES Neb. Rev. Stat. §§ 28.311.02-311.05
Warrantless Arrest for Domestic Violence	YES § 46-6-311	YES § 29-404.02(3)
Protective Orders	YES §§ 40-4-121-125; 40-15-101, *et seq.*; 45-5-626	YES § 42-90, *et seq.*
Civil Tort: Assault/Battery	YES 909 P.2d 1158	YES 551 N.W.2d 528
Civil Tort: Intentional Infliction of Emotional Distress	YES 896 P.2d 411	YES 227 N.W.2d 402

	Nevada	New Hampshire
Anti-Stalking Laws	YES Nev. Rev. Stat. § 200.575-597	YES N.H. Rev. Stat. § 633:3-a
Warrantless Arrest for Domestic Violence	YES § 171.137	YES § 173-B:9
Protective Orders	YES § 33.017, *et seq.*	YES § 173B, *et seq.*
Civil Tort: Assault/Battery	YES 930 P.2d 94	YES 132 A.2d 136
Civil Tort: Intentional Infliction of Emotional Distress	YES 625 P.2d 90	YES 593 A.2d 1158

	New Jersey	New Mexico
Anti-Stalking Laws	YES N.J. Stat. Ann. § 2C:12-10	YES N.M. Stat. Ann. § 30:3A-3
Warrantless Arrest for Domestic Violence	YES § 2C:25-21(a)	YES § 31-1-7(a)
Protective Orders	YES § 2C:25-17, *et seq.*	YES § 40-13-2, *et seq.*
Civil Tort: Assault/Battery	YES* 663 A.2d 109	YES 574 P.2d 597
Civil Tort: Intentional Infliction of Emotional Distress	YES 544 A.2d 857	YES 812 P.2d 1320

* *E.g.*, *Sielski v. Sielski*, 604 A.2d 206 (N.J. Super. 1992) (wife who suffered physical attack by husband recovered $7,000 in damages).

	New York	North Carolina
Anti-Stalking Laws	YES N.Y. Penal Law §§ 120.3 & 14; 240.26, .31	YES N.C. Gen. Stat. § 14.277.3
Warrantless Arrest for Domestic Violence	YES N.Y. Crim. Proc. § 140.025(1)	YES § 15A-401(b)
Protective Orders	YES N.Y. Fam. Ct. Act §§ 29A: 1-655 & 656; 153, *et seq.*	YES § 50B-1, *et seq.*
Civil Tort: Assault/Battery	YES 488 N.Y.S.2d 15	YES 502 S.E.2d 430
Civil Tort: Intentional Infliction of Emotional Distress	YES 373 N.E.2d 1215	YES 276 S.E.2d 325

	North Dakota	Ohio
Anti-Stalking Laws	YES N.D. Cent. Code § 12.1-17-07.1	YES Ohio Rev. Code § 2903.211
Warrantless Arrest for Domestic Violence	YES § 14-07.1-11	YES § 2935.03(B)
Protective Orders	YES § 14.07.01, *et seq.*	YES § 3113.31
Civil Tort: Assault/Battery	YES 442 N.W.2d 907	YES 524 N.E.2d 166
Civil Tort: Intentional Infliction of Emotional Distress	YES 435 N.W.2d 918	YES 453 N.E.2d 666

	Oklahoma	Oregon
Anti-Stalking Laws	YES Okla. Stat. tit. 21, § 1173	YES Or. Rev. Stat. § 163.732
Warrantless Arrest for Domestic Violence	YES Tit. 22 § 40.3(B)	YES § 133.055(2)
Protective Orders	YES Tit. 22 § 60.1, *et seq.*	YES § 107.700, *et seq.*
Civil Tort: Assault/Battery	YES 905 P.2d 223	YES 560 P.2d 275
Civil Tort: Intentional Infliction of Emotional Distress	YES 575 P.2d 1374	YES 637 P.2d 126

	Pennsylvania	Rhode Island
Anti-Stalking Laws	YES 18 Pa. Cons. Stat. § 2709	YES R.I. Gen. Laws § 11-59-2
Warrantless Arrest for Domestic Violence	YES 18 Pa. Cons. Stat. § 2711	YES § 12-29-3
Protective Orders	YES 23 § 6102, *et seq.*	YES § 15-15-1, *et seq.*
Civil Tort: Assault/Battery	YES 648 A.2d 793	YES 694 A.2d 691
Civil Tort: Intentional Infliction of Emotional Distress	YES 670 A.2d 173	YES 478 A.2d 985

	South Carolina	South Dakota
Anti-Stalking Laws	YES S.C. Code § 16-3-1700, *et seq.*	YES S.D. Codified Laws § 22-19A-1, *et seq.*
Warrantless Arrest for Domestic Violence	YES § 16-25-70	YES § 23-A-3-21
Protective Orders	YES § 20-4-10, *et seq.*	YES § 25-10-1, *et seq.*
Civil Tort: Assault/Battery	YES 259 S.E.2d 117	YES 484 N.W.2d 864
Civil Tort: Intentional Infliction of Emotional Distress	YES 276 S.E.2d 776	YES* 410 N.W.2d 159

* Unavailable against a spouse except based on post-divorce conduct. *Henry v. Henry*, 534 N.W.2d 844 (S.D. 1995). Other international tort actions against spouses remain available. *See id.*; *Scotvold v. Scotvold*, 68 S.D. 53 (1941).

	Tennessee	Texas
Anti-Stalking Laws	YES Tenn. Code § 39-17-315	YES Tex. Hum. Res. Code Ann. § 42.072
Warrantless Arrest for Domestic Violence	YES § 40-7-103(A)	YES Tex. Code Crim. Proc. art. 14.03
Protective Orders	YES § 36-3-601, *et seq.*	YES Family Code § 71.001, *et seq.*
Civil Tort: Assault/Battery	YES 963 S.W.2d 726	YES* 2 S.W.3d 346
Civil Tort: Intentional Infliction of Emotional Distress	YES 398 S.W.2d 270	YES** 855 S.W.2d 619

* *DeLeon v. Hernandez*, 814 S.W.2d 531 (Tex. Ct. App. 1991) (reversing summary judgment against woman who sued husband for assault and battery).

** *Massey v. Massey*, 867 S.W.2d 766 (Tex. 1993) (affirming $362,000 award for emotional distress); *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993).

	Utah	Vermont
Anti-Stalking Laws	YES Utah Code § 76-5-106.5	YES Vt. Stat., tit. 13, § 1061, *et seq.*
Warrantless Arrest for Domestic Violence	YES §§ 30-6-8, 77-36-2	YES Vt. R. Crim. P. 3
Protective Orders	YES §§ 30-6-1, *et seq.*; 76-5-108	YES Tit. 15 § 1101, *et seq.*
Civil Tort: Assault/Battery	YES 915 P.2d 500	YES 477 A.2d 964
Civil Tort: Intentional Infliction of Emotional Distress	YES 358 P.2d 344	YES 392 A.2d 431

	Virginia	Washington
Anti-Stalking Laws	YES Va. Code § 18.2-60.3	YES Wash. Rev. Code § 9A.46.110
Warrantless Arrest for Domestic Violence	YES § 19.2-8, 81	YES § 10.31.100(2)
Protective Orders	YES § 16.1-253.1, *et seq.*	YES § 26.50.01, *et seq.*
Civil Tort: Assault/Battery	YES 491 S.E.2d 718	YES* 943 P.2d 1141
Civil Tort: Intentional Infliction of Emotional Distress	YES 210 S.E.2d 145	YES 530 P.2d 291

* *E.g., Goode v. Martinis*, 361 P.2d 941 (Wash. 1961).

	West Virginia	Wisconsin
Anti-Stalking Laws	YES W. Va. Code § 61-2-9A	YES Wis. Stat. § 940.32
Warrantless Arrest for Domestic Violence	YES § 48-2A-14	YES § 968.075(2)
Protective Orders	YES § 48-2A-1	YES §§ 813.12; 813.122
Civil Tort: Assault/Battery	YES 356 S.E.2d 620	YES 436 N.W.2d 308
Civil Tort: Intentional Infliction of Emotional Distress	YES 289 S.E.2d 692	YES 124 N.W.2d 312

	Wyoming	
Anti-Stalking Laws	YES Wyo. Stat. § 6-2-506	
Warrantless Arrest for Domestic Violence	YES § 7-20-102	
Protective Orders	YES § 35-21-101, *et seq.*; § 6-4-404	
Civil Tort: Assault/Battery	YES 803 P.2d 1358	
Civil Tort: Intentional Infliction of Emotional Distress	YES 803 P.2d 1358	

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